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Nos. 00-445, 00-632 and 00-633

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

-and-

STATE OF MICHIGAN, *et al.*,
Petitioners,

-and-

STATES OF OHIO AND INDIANA,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS NEW YORK, CONNECTICUT, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, PENNSYLVANIA, RHODE ISLAND AND VERMONT IN OPPOSITION TO PETITIONS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Environmental Protection Agency (EPA), in allocating equitably the burden of emission reductions among "upwind" States found to contribute significantly to "downwind" States' nonattainment of the National Ambient Air Quality Standard (NAAQS) for ozone pursuant to section 110(a)(2)(D) of the Clean Air Act, is allowed to consider the relative cost to each upwind State of emission reductions after first determining which States are significant contributors based solely on air quality factors.

2. Whether the court below correctly held that EPA's exercise of its administrative authority to identify the upwind States with emission levels that contributed significantly to nonattainment of NAAQS in downwind States and determine the amount of emission reductions required of upwind States did not violate the non-delegation doctrine.

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Counterstatement of the Case	1
A. Statutory and Regulatory Background: Establishing and Maintaining the NAAQS	2
B. Transported Ozone Pollution and the NO_x SIP Call	3
C. The Decision of the Court of Appeals	7
Reasons for Denying the Writ	8
I. The Clean Air Act And Decisions Of This Court Permit EPA's Consideration Of Cost-Effectiveness In Identifying The Emission Reductions Required Of Each State.	10
A. The Court of Appeals' Decision is Not Inconsistent with Decisions of this Court and the D.C. Circuit Prohibiting the Consideration of Costs in Other Contexts.	10

Contents

Page

1. Industry petitioners' attempt to create the appearance of an inconsistency with other D.C. Circuit cases does not provide a basis for certiorari. 11

2. Michigan's argument that the Court of Appeals' decision is contrary to this Court's holdings in *Union Electric Co.* and the holding of the D.C. Circuit in *Lead Industries Association* should be rejected because it misconstrues those cases and was not properly preserved for this Court's consideration. 13

B. The Upwind States' Argument that the NO_x SIP Call Rule Violates Principles of "Federalism" and "State Sovereignty" is Meritless and does not Provide a Basis for Certiorari. 17

II. The Court Below Correctly Rejected Petitioners' Nondelegation Arguments. 19

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

American Petroleum Institute v. United States EPA, 52 F.3d 1113 (D.C. Cir. 1995) 12

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 20, 21

American Trucking Assns. v. EPA, 175 F.3d 1027, *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003, 120 S. Ct. 2193 (2000) 2, 21, 22

Browner v. American Trucking Ass'ns, U.S. Supreme Court Nos. 99-1257, 99-1263 and 99-1265 (argued on November 7, 2000) 22

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) 22

Davis v. United States, 417 U.S. 333 (1974) 11

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 14

Ethyl Corp. v. EPA, 51 F.3d 1053 (D.C. Cir. 1995) 11

FPA v. Hope Natural Gas Co., 320 U.S. 591 (1944) 19

Cited Authorities

Page

International Union, UAW v. OSHA, 37 F.3d 665 (D.C. Cir. 1994) 10

Lead Industries Association v. EPA, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) 2, 13, 14, 15, 16

Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000) 5, 6, 7, 8, 10, 20

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 19

Natural Resources Defense Council v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) 7

SEC v. Chenery, 332 U.S. 194 (1947) 21

South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) 21, 22

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 21

Touby v. United States, 500 U.S. 160 (1991) 19, 20

Union Electric Co. v. EPA, 427 U.S. 246 (1976) 3, 9, 11, 13, 14, 15, 16, 17

United States v. Mistretta, 488 U.S. 361 (1988) ... 19

Cited Authorities

Page

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 19

Yakus v United States, 321 U.S. 414 (1944) 19

Statutes:

Clean Air Act Section 108, 42 U.S.C. § 7408 2

Clean Air Act Section 109, 42 U.S.C. § 7409 ..... 2, 13, 15

Clean Air Act Section 109(b)(1), 42 U.S.C. § 7409(b)(1) 2

Clean Air Act Section 110, 42 U.S.C. § 7410 ..... 2, 8, 13, 15, 18, 22

Clean Air Act Section 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A) 3

Clean Air Act Section 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D) .. i, 3, 7, 9, 10, 11, 12, 13, 19

Clean Air Act Section 110(k)(5), 42 U.S.C. § 7410(k)(5) 13

Clean Air Act Section 307(b), 42 U.S.C. § 7607(b) 11

Clean Air Act Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B) 14

Cited Authorities

Page

Other Authorities:

H.R. 95-294, 330 95th Cong. 1st Sess., reprinted in 4 *A Legislative History of the Clean Air Act Amendments of 1977*, 2797 (1978) 20

S. Rep. No. 95-127, reprinted in *A Legislative History of the Clean Air Act Amendments of 1977* (1978) 3

S. Rep. No. 101-228 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3389 4

42 Fed. Reg. 8202 2

63 Fed. Reg. 57356, *et seq.* (1998) 1

63 Fed. Reg. 57363 ..... 14, 17

63 Fed. Reg. 57377 1

63 Fed. Reg. 57379 ..... 6, 7, 16

63 Fed. Reg. 57386 7

63 Fed. Reg. 57387-99 5

663 Fed. Reg. 57387 4

63 Fed. Reg. 57389-391 7

Cited Authorities

	Page
63 Fed. Reg. 57394	5
63 Fed. Reg. 57399	6
63 Fed. Reg. 57400	6
Air Quality Modeling Technical Support Document for the Regional NO_x SIP Call (September 21, 1998)	5
Breyer, *et al.*, *Administrative Law and Regulatory Policy* 65 (4th ed. 1999)	10
Stern, *et al.*, *Supreme Court Practice* 176 (7th ed. 1993)	11

The States of New York, Connecticut, Maine, Maryland, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, and Vermont (collectively, the "respondent States") oppose the petitions for certiorari filed by petitioners Appalachian Power Company, *et al.* (hereinafter "Industry petitioners"), State of Michigan, *et al.* (hereinafter "Michigan") and State of Ohio, *et al.* (hereinafter "Ohio"). The petitions seek review of the March 3, 2000 judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the bulk of EPA's NO_x SIP Call rule (the "Rule"). *See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Rule*, 63 Fed. Reg. 57356, *et seq.* (1998). For the reasons set forth below, the petitions should be denied, thereby allowing timely implementation of the Rule and enabling the downwind States to meet their statutory obligation to ensure that their residents breathe clean air.

COUNTERSTATEMENT OF THE CASE

In 1998, EPA promulgated the NO_x SIP Call, which requires that twenty-two States and the District of Columbia revise their State Implementation Plans (SIPs) to reduce emissions of nitrogen oxides (NO_x). The Rule was based on overwhelming evidence, undisputed in this case, that emissions of NO_x pollution from numerous sources in many States in the eastern half of the United States contribute to harmful levels of ozone, a pollutant that causes respiratory distress, in many portions of the eastern United States. *See* 63 Fed. Reg. at 57377. Recognizing that many States would have difficulty in achieving the National Ambient Air Quality Standard (NAAQS) for ozone without reductions in the incoming pollution levels, EPA exercised its authority

under section 110 of the Clean Air Act (the "Act") to require emission reductions in all States that contribute to the problem of transported ozone pollution. Implementation of the NO_x SIP Call will ensure that residents of much of the eastern half of the nation, including but not limited to residents of the respondent States, will obtain the benefits of clean air within the timetable set by Congress in the 1990 amendments to the Act.

A. Statutory and Regulatory Background: Establishing and Maintaining the NAAQS

Under sections 108 and 109 of the Act, EPA is responsible for identifying the pollutants that are harmful to public health when present in the ambient air and for establishing the ambient levels of such pollutants that the States are required to achieve. The Act requires EPA to set NAAQS for these "criteria pollutants" at levels that are "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). Under long-standing EPA practice and the holdings of the D.C. Circuit, EPA is to set the NAAQS without regard to the economic ramifications of the levels chosen. *See American Trucking Assns. v. EPA*, 175 F.3d 1027, 1038, *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003, 120 S. Ct. 2193 (2000) (*ATA*); *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).[1] EPA set the NAAQS for ozone at issue in this case in 1979. *See* 44 Fed. Reg. 8202 (1979).

Section 110 of the Act requires each State to submit to EPA a SIP that provides for the attainment of the NAAQS

1. The continuing validity of this principle is being reviewed by the Court in *ATA*.

within the State. The SIP must demonstrate how State regulations will result in the emission reductions necessary to achieve the NAAQS. This Court has held that technical or economic infeasibility does not excuse a State from its obligation to achieve acceptable air quality for its citizens. *See Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

Congress recognized, however, that a State may be prevented from attaining the NAAQS, or at least hampered in its efforts to do so, by pollution transported from other States. Accordingly, just as section 110(a)(2)(A) requires each State to submit a plan to attain the NAAQS, section 110(a)(2)(D) requires each State's plan to ensure that emissions activities within its borders do not "contribute significantly" to nonattainment downwind. This obligation is "intended to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." S. Rep. No. 95-127, reprinted in *A Legislative History of the Clean Air Act Amendments of 1977* (1978) at 1416 (the "1977 Senate Report").

B. Transported Ozone Pollution and the NO_x SIP Call

In promulgating the Clean Air Act Amendments of 1990, Congress recognized that regional control strategies were still needed to address the migration of ozone and its precursors:

> The bill reflects an increasing understanding of how ozone pollution is formed and transported. Because ozone is not a local phenomenon but is formed and transported over hundreds of miles and several days, localized control strategies will not be effective in reducing ozone levels.

S. Rep. No. 101-228 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3389, 3399. To develop a regional control strategy for attaining the NAAQS across the eastern half of the United States, all States east of the Rocky Mountains (including the District of Columbia) participated in the working group known as the Ozone Transport Assessment Group (OTAG), which tried to craft a solution to the problem of transported ozone. Although the participating States endorsed OTAG's extensive and sophisticated technical analyses and recognized that region-wide NO_x reductions were needed, the divergent interests of the OTAG States prevented them from agreeing on the details of a control strategy, including the level of NO_x reductions required. In general, the northeastern States, which are downwind of the bulk of the NO_x emission sources, advocated more stringent controls than Ohio, Michigan and the other States joining in the petitions for certiorari, which are host to many of the large NO_x emission sources.

In the absence of a State consensus on all the elements of a NO_x control program, EPA used OTAG's data and analyses to develop the NO_x SIP Call, the rule at issue here. In doing so, EPA evaluated the contribution of NO_x emissions in thirty-seven States east of the Rocky Mountains to ozone noncompliance in a number of eastern, southern and midwestern locations, including the New York City metropolitan area and other urban areas along the eastern seaboard, the Atlanta, Birmingham, Chicago, Cincinnati, Louisville, Pittsburgh and St. Louis metropolitan areas, and southwestern Michigan. *See* 63 Fed. Reg. at 57387. Given the number of source and receptor regions, EPA had to consider hundreds of source/receptor combinations. Using advanced air quality modeling techniques, EPA identified twenty-two States and the District of Columbia as "significant

contributors" to ozone nonattainment in other States, based on its evaluation of the magnitude, frequency and relative amount of each State's contribution to ozone non-attainment in downwind States. *See* 213 F.3d at 675. EPA determined that each of these States was making a significant contribution to ozone nonattainment in at least two other States and, in many cases, in numerous downwind States in different directions and at different distances from the upwind State. *See* 63 Fed. Reg. at 57394, Table II-4.[2] For example, EPA found that Indiana contributes significantly to ozone nonattainment in a number of eastern seaboard areas such as New York City and Baltimore, as well as to the nonattainment problems in Southwestern Michigan (to the north), Cincinnati (to the southeast), Louisville (to the south), and Chicago (to the northwest). Indiana's contribution ranged from an average of 17% to Louisville's ozone levels, 11% to Cincinnati's, 10% to southwestern Michigan's and 9% to Chicago's, to average contributions in the range of 1-2% to ozone levels in eastern seaboard locations.[3]

Once it identified the twenty-three jurisdictions that were significant contributors to at least two downwind ozone nonattainment areas, EPA determined the amount by which each State's NO_x emissions should be reduced to mitigate its significant contribution to numerous downwind States.

2. With the exception of Tennessee, West Virginia and the Carolinas, each of the States identified as significant contributors contains at least a portion of a nonattainment area within its borders.

3. Detailed listing of the contributions to downwind nonattainment of each of the twenty-three jurisdictions subject to the Rule are contained in the *Air Quality Modeling Technical Support Document for the Regional NO_x SIP Call* (September 21, 1998) (which is part of the record before the court below) and summarized at 63 Fed. Reg. at 57387-99.

In so doing, EPA recognized that each upwind State contributes in varying degrees to ozone nonattainment in several downwind States and that each nonattainment area's ozone originated in a number of upwind States. Thus, rather than requiring an upwind State to reduce its emissions by different amounts for each downwind area affected by its emissions, EPA determined that a single level of emission reduction would mitigate the impact of that State's emissions on all downwind States. EPA decided to require only the level of emission reductions that could be obtained in a highly cost-effective manner — that is, at a cost of $2000 per ton or less. *See* 213 F.3d at 675. Rather than requiring each State that contributed significantly to downwind nonattainment to eliminate all its NO_x emissions, EPA concluded that it is fair and consistent with the Act to require upwind States "to reduce *at least* the portion of their emissions for which highly cost-effective controls are available." 63 Fed. Reg. at 57379.

EPA based the $2000/ton figure on "$NO_x$ emissions controls that are available and of comparable cost to other recently undertaken or planned NO_x measures," including "the types of controls EPA and States have needed to adopt most recently because their previous planning efforts have already taken advantage of opportunities for even cheaper controls." *Id.* at 57400. In other words, the $2000/ton figure was based on the costs of controls already being incurred in the downwind States that are burdened by ozone transport. EPA explained that its selection of the $2000/ton criterion was a "first approximation" at determining the level of controls that should be required of upwind sources to eliminate significant contributions to downwind nonattainment and that further reductions may be required in the future if needed to achieve regional ozone nonattainment. *See id.* at 57399.

On the basis of additional modeling, EPA determined that the emissions reductions achieved through application of highly cost-effective measures throughout the region would allow nonattainment areas to make "appreciable progress towards attainment," but would not require more reductions in upwind States than necessary to achieve attainment in all downwind areas affected by those States' emissions. *Id.* at 57379, 57386 n.38, 57389-391. Thus, without requiring any States to implement unduly costly control requirements, the Rule enables all States in the eastern half of the United States to obtain the benefits of clean air for their residents.

C. The Decision of the Court of Appeals

The Rule was challenged by numerous utilities and businesses and by several midwestern and southern states. On March 3, 2000, the Court of Appeals issued its decision upholding the bulk of the NO_x SIP Call. *See Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). The court first upheld EPA's use of complicated air quality modeling in identifying States as significant contributors. *See id.* at 673-74. It then determined that EPA did not err in using costs in determining the amount of emission reductions required from each State that had been found to contribute significantly to downwind nonattainment. In so doing, the court relied upon its own longstanding precedent that an agency may consider costs unless there is a "clear congressional intent to preclude consideration of cost." *Id.* at 678 (quoting *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987)). The court concluded that the phrase "contribute significantly" in section 110(a)(2)(D) does not express a clear congressional intent to exclude consideration of cost. *See id.* at 679. Without actually determining that the phrase

"contribute significantly" *requires* consideration of costs or equitable factors, the court noted that it would be difficult to draw a line between the level of emissions that are permissible and those that are not without considering costs and other equitable factors. *See id.* at 678. The court below also rejected several other arguments, including a nondelegation challenge. *See id.* at 680-81.[4]

Petitions for rehearing and rehearing *en banc* were denied on June 22, 2000.

REASONS FOR DENYING THE WRIT

None of the petitioners disputes the public health dangers associated with high levels of ozone pollution. Nor do petitioners contest EPA's conclusion that the ozone attainment problems throughout the eastern half of the nation result from emission activity at hundreds of large and small sources of NO_x emissions across the region or its finding that each source State individually contributes to NAAQS non-attainment in numerous downwind States in widely differing amounts. Furthermore, the petitioners agree that EPA has authority under section 110 to require upwind States to revise their SIPs to mitigate their contribution to downwind ozone nonattainment.

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4. The D.C. Circuit did vacate certain aspects of the Rule. It determined that Wisconsin should not have been included in the Rule and that the emission reductions required of Georgia and Missouri should be based solely on the emissions from the portions of those States found to contribute to downwind nonattainment. *See* 213 F.3d at 681-85. It also determined that EPA did not provide sufficient notice of the definition of an electric generating unit and of the control level assumed for large stationary internal combustion engines. *See id.* at 691-94.

Instead, the petitioners' only complaint is with the level of emission reductions required in Ohio, Michigan and the other petitioning States. They claim that EPA misconstrued the term "contribute significantly" in section 110(a)(2)(D) of the Clean Air Act by including costs of controls among the factors considered in determining the amount of emission reduction required of each State that contributes to regional ozone pollution. Although Ohio tries to inflate the importance of the issue by suggesting that EPA's analysis is not "federalism-sensitive," this issue involves routine administrative application of a statutory standard that does not merit review by this Court. In fact, although the various petitioners do not agree on the reasons why EPA's consideration of costs violated the Act, some of them recognize that costs can play a role in the analysis and argue that EPA erred not in considering costs at all, but in the way it considered costs. *Industry Pet.* at 12; *Ohio Pet.* at 10-11.[5]

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5. Michigan adheres to the position that costs should play no role in the analysis, despite acknowledging that the case on which it chiefly relies, *Union Electric*, *supra*, recognizes a role for consideration of costs under section 110. *Michigan Pet.* at 9 n.4.

I.

THE CLEAN AIR ACT AND DECISIONS OF THIS COURT PERMIT EPA'S CONSIDERATION OF COST-EFFECTIVENESS IN IDENTIFYING THE EMISSION REDUCTIONS REQUIRED OF EACH STATE.

A. The Court of Appeals' Decision is Not Inconsistent with Decisions of this Court and the D.C. Circuit Prohibiting the Consideration of Costs in Other Contexts.

Section 110(a)(2)(D) does not specify how EPA should determine what emissions make a significant contribution to downwind States. It does not say that cost-effectiveness of controls or other economic factors are relevant considerations. Nor does section 110(a)(2)(D) preclude the consideration of cost-effectiveness of controls in determining the amount of excess emissions in each State. Accordingly, the Court of Appeals acted properly in concluding that EPA may consider the costs of controlling emissions in determining whether the risk posed by the emissions is significant. *See* 213 F.3d at 677-78 (citing *International Union, UAW v. OSHA*, 37 F.3d 665, 668-69 (D.C. Cir. 1994), and Breyer, *et al.*, *Administrative Law and Regulatory Policy* 65 (4th ed. 1999)).

Both the State petitioners and the Industry petitioners misconstrue the role of costs in EPA's analysis. They attempt unsuccessfully to demonstrate an inconsistency between the D.C. Circuit's decision in this case, which upholds EPA's consideration of costs for the limited purpose of allocating the burdens of emission reductions, and decisions of this Court and the D.C. Circuit addressing EPA's use of cost considerations in unrelated contexts.

1. Industry petitioners' attempt to create the appearance of an inconsistency with other D.C. Circuit cases does not provide a basis for certiorari.

The Industry petitioners' argument that the Court of Appeals' decision is inconsistent with prior D.C. Circuit cases does not support the grant of certiorari in this case. As an initial matter, an alleged conflict between decisions of the D.C. Circuit does not provide a basis for certiorari. Conflicts between decisions of a single court of appeals should be addressed through petitions for rehearing *en banc*, rather than through certiorari. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974) (referencing earlier petition for certiorari that had been denied when conflict was between decisions of the same Circuit); *see also* Stern, *et al., Supreme Court Practice* 176 (7th ed. 1993). Petitioners' suggestion that an inter-circuit conflict over a Clean Air Act issue cannot possibly arise because the D.C. Circuit has sole jurisdiction over appeals of actions and administrative proceedings under the Act (*Michigan Pet.* at 19) is not only irrelevant but simply wrong. EPA's administrative determinations regarding the compliance of SIPs with the requirements of section 110(a)(2)(D) are generally reviewed in the circuit for the state whose SIP is being challenged. *See* 42 U.S.C. § 7607(b). In fact, the challenge to the Missouri SIP in *Union Electric*, upon which Michigan relies, was heard by the Eighth Circuit, not the D.C. Circuit. *See* 427 U.S. at 252-53.

Furthermore, the decisions on which Industry petitioners rely are inapposite to the present case. In *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995), the D.C. Circuit held that a regulation that allowed EPA to prohibit a fuel additive only if it "cause[d] or contribute[d] to failure of any emission

control device" did not provide EPA with the authority to bar the additive on the entirely unrelated ground that it may cause adverse health effects. Likewise, in *American Petroleum Institute v. United States EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("*API*"), EPA improperly promulgated fuel content regulations that were directed at promoting the use of renewable fuel sources, rather than at reducing emissions of volatile organic compounds and toxic air pollutants, as required by Congress. These decisions interpreted statutes clearly barring the use of factors that had been erroneously applied by EPA, whereas in this case section 110(a)(2)(D) does not bar the consideration of costs. In fact, EPA's consideration of the relative costs of controlling emissions is consistent with Congressional intent that the burden of controlling interstate pollution be shared by all States that contribute to the problem. *See 1977 Senate Report* at 1416.

Nor did EPA's rule subordinate air quality factors to considerations of cost-effectiveness. Industry petitioners overstate the role of costs in EPA's determination when they contend that EPA "considered as its sole factor the cost-effectiveness of emission reductions in determining whether one state's contribution to another state's ozone nonattainment air quality is 'significant.' " *Industry Pet.* at 13. In fact, as the State petitioners recognize, EPA's determination of whether a State contributed significantly to downwind nonattainment was based solely on air quality factors, with costs playing a role only in determining the amount of emissions to be reduced. *Michigan Pet.* at 5-6; *Ohio Pet.* at 4-5.[6]

6. If Industry petitioners were right that cost of compliance was the sole factor considered by EPA, the Rule would have encompassed all thirty-seven States included in OTAG, rather than just the twenty-

(Cont'd)

Ultimately, Industry petitioners concede that EPA may consider the relative costs of controls in determining the NO_x reductions required of each State, albeit under section 110(k)(5) of the Act rather than section 110(a)(2)(D). *Industry Pet.* at 18. This distinction, however, has no basis in the language of the statute, because, like section 110(a)(2)(D), section 110(k)(5) contains no specific reference to the consideration of costs. If such consideration of costs is valid, it is equally valid under both provisions.

2. Michigan's argument that the Court of Appeals' decision is contrary to this Court's holdings in *Union Electric Co.* and the holding of the D.C. Circuit in *Lead Industries Association* should be rejected because it misconstrues those cases and was not properly preserved for this Court's consideration.

Michigan's primary argument, that prior decisions under sections 109 and 110 of the Act prohibit EPA from considering costs in setting the NAAQS and in reviewing SIPs for compliance with those NAAQS, was not presented to the court below. The cases upon which Michigan now relies — *Lead Industries Association* and *Union Electric* — are cited nowhere in the Brief or Reply Brief filed below by Michigan and other upwind States. The explanation for that omission is simple: the premise of both *Union Electric* and *Lead Industries Association* — that costs and economic

(Cont'd)
two States and the District of Columbia that were ultimately included in the Rule. In fact, those twenty-three jurisdictions were included because the impact of their emissions on downwind States exceeded a certain air quality threshold, not because they contained sources that could be controlled at a cost of less than $2000 per ton.

factors cannot be used to weaken the public health protection provided by the NAAQS — is inconsistent with Michigan's position before the Court of Appeals, where it argued that the emission reductions required by the NO_x SIP Call were more extensive than needed. *See, e.g. Reply Brief of Petitioning States* at 11-12. Now, in an effort to take advantage of the *Union Electric* and *Lead Industries Association* holdings, Michigan shifts gears, suggesting — without any basis in the record and contrary to the results of EPA's modeling — that EPA's consideration of costs somehow weakened the public health protections of the Act.[7]

As an initial matter, this Court should reject Michigan's argument as a basis for *certiorari* because the argument was neither presented to EPA during the public comment process, as required by CAA section 307(d)(7)(B),[8] nor made to the court below. *See, e.g. Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (refusing to consider propriety of award of costs because that issue was not raised in the court of appeals). In fact, Michigan and its co-petitioners were participants in OTAG, which recommended that cost-effectiveness of controls be included as one of the criteria for selection of a strategy to reduce transported ozone. *See* 63 Fed. Reg. at 57363.

In any event, there is no conflict between the decision below and decisions considering the use of costs to reduce

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7. Notably, Ohio (the lead upwind State in the D.C. Circuit proceedings) and Indiana do not join Michigan in this new argument.

8. Section 307(d)(7)(B) provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review."

protections against unhealthy air under other provisions of the Clean Air Act. EPA's consideration of costs did not reduce the level of public health protection at all; in fact, the Rule's emission reduction requirements are the most stringent of the range of possible reductions identified by OTAG. Instead of using cost considerations to reduce public health protection, EPA used relative costs of NO_x reductions to allocate equitably the emission reductions needed to achieve the preexisting public health goal of attainment of the NAAQS. Thus, in the present case, unlike the decisions on which Michigan relies, the consideration of costs is consistent with, rather than contrary to, Congress' intent to protect the public from the adverse health effects of poor air quality.

In *Lead Industries Association,* the D.C. Circuit held that EPA could not, in setting the health-based primary NAAQS, consider the economic feasibility of attaining the NAAQS. The court held that the language of section 109 evidenced a clear Congressional intent that the NAAQS should be set solely on the basis of the need to protect public health. The court emphasized that the NAAQS are intended to be "technology-forcing," meaning that Congress understood and intended that industry would have to develop new technologies, at potentially great cost, to achieve the NAAQS. *See* 647 F.2d at 1149. Similarly, in *Union Electric*, this Court found that EPA need not consider the feasibility of compliance with a SIP in evaluating the sufficiency of a SIP under section 110 of the Act. In that case, Union Electric, an electric utility located in Missouri, challenged EPA's approval of the Missouri SIP on the ground that compliance with the emission limitations contained in the SIP was not technologically and economically feasible. The Court held that EPA may not allow claims of economic and technological

feasibility to excuse a State from submitting a SIP that promotes attainment of the health-based NAAQS. *See* 427 U.S. at 265. Notably, however, the Court recognized that economic factors may be considered as long as "consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards." 427 U.S. at 266.

In the present case, by contrast, EPA's consideration of costs does not interfere with the prompt attainment of the national air quality standards. Congress' goal, as in *Lead Industries Association* and *Union Electric*, is attainment of NAAQS by specific dates. EPA set the requisite ozone NAAQS without regard to economic factors, and EPA's consideration of costs does not reduce the protection provided by the NAAQS to downwind States and their residents. To the contrary, EPA's modeling confirmed that the emission reductions required by the Rule, after consideration of costs, will enable downwind States, including some of the State respondents, to make significant progress towards attainment of the NAAQS.[9] *See* 63 Fed. Reg. at 57379. The costs of reducing NO_x emissions to achieve these NAAQS were considered only in allocating the burden of reducing NO_x emissions among the various States that contribute to ozone

9. EPA recognized that the downwind States may have to bear an additional burden in attaining the NAAQS because the emission reductions required by the NO_x SIP Call are sufficient to put the NAAQS within reach of all States, but may be insufficient to bring about attainment of the NAAQS in all locations without any further reductions from the downwind States. Of course, EPA could have provided for attainment by raising the cost cut-off from $2000 to a higher level, perhaps $2500. It is the downwind States that support the Rule that may have to implement the higher level of controls themselves, not upwind States like Michigan.

nonattainment in the eastern United States, thereby effectuating Congress' intent to apportion equitably the burden of emission reduction efforts. Far from "interfer[ing] with the primary congressional purpose of prompt attainment of the national air quality standards," the NO_x SIP Call rule makes such attainment possible throughout the eastern portion of the United States without requiring any unneeded emission reductions.[10] In the absence of this Rule, regions that are home to millions of Americans will not achieve the NAAQS within the timetable set by Congress. *Id.* at 57363.

B. The Upwind States' Argument that the NO_x SIP Call Rule Violates Principles of "Federalism" and "State Sovereignty" is Meritless and does not Provide a Basis for Certiorari.

The State petitioners contend that EPA misallocated the burden of emission reductions among the States. Michigan and Ohio (and their co-petitioners) evidently believe that EPA's method of apportioning the burden of compliance in accordance with the costs of controlling the emissions results in sources in those States bearing a greater share of emission reductions than they would like. In an attempt to disguise their challenge to EPA's method as a subject that might merit

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10. EPA's use of costs in this case is similar to the waiver process approved by this Court in *Union Electric*. The Court determined that States are free to exempt facilities or industry groups from control requirements under the SIP on grounds of economic infeasibility so long as doing so does not interfere with attainment of the NAAQS. *See* 427 U.S. at 266-67. Likewise, here EPA is free to exclude sources that cannot be controlled in a highly cost-effective manner from its calculation of State budgets, as long as doing so does not interfere with attainment of the NAAQS.

this Court's review, Ohio contends, without supporting its position and without citation to case law, that EPA's application of section 110 is somehow inconsistent with unspecified principles of "federalism" or "state sovereignty."

Underlying this argument is the State petitioners' failure to recognize that each upwind State contributes to varying degrees to numerous downwind States. For example, State petitioners note that Indiana and Pennsylvania are being required to reduce their emissions by approximately the same amount, even though Pennsylvania's impact on the downwind New York City nonattainment area is greater. *Ohio Pet.* at 12-13; *Michigan Pet.* at 22-23. The State petitioners ignore, however, that Indiana emissions have a much greater effect than Pennsylvania emissions on other nonattainment areas that are closer to Indiana, such as Louisville (to which Indiana contributes an average of 17% of the ozone and Pennsylvania less than 1%), Cincinnati (Indiana 11%; Pennsylvania 1%), Southwestern Michigan (Indiana 10%; Pennsylvania less than 1%) and Chicago (Indiana 9%; Pennsylvania less than 1%). Thus, shifting the focus from New York City to Cincinnati, Chicago or Louisville as a receptor area would mean that it is Pennsylvania, rather than Indiana, that is being required to obtain excess emission reductions under the Rule. Considering that each upwind State contributes varying amounts of ozone to numerous downwind States, EPA's approach recognizes the impossibility of requiring that a State reduce its emissions by different amounts for each downwind State to which it contributes.

Ultimately, EPA's allocation methodology follows from its recognition that nonattainment throughout the eastern half of the United States is the result of the collective contribution

of countless sources throughout the area, a finding that is being challenged by none of the Petitioners. In light of the regional nature of the ozone nonattainment problem, the Rule effectuates Congressional intent to allocate the burden of compliance among the States containing sources that contribute to the problem. Notwithstanding State petitioners' attempt to disguise their challenge as a defense of federalism, their argument that EPA could or should have allocated the emission reductions differently does not implicate principles of State sovereignty.

II.

THE COURT BELOW CORRECTLY REJECTED PETITIONERS' NONDELEGATION ARGUMENTS.

The Industry petitioners' effort to obtain review of the D.C. Circuit's nondelegation holding fails for several reasons. First, and most fundamentally, the delegation at issue in this case is narrower than the broad delegations that have been upheld by this Court. *See, e.g. Touby v. United States*, 500 U.S. 160 (1991); *United States v. Mistretta*, 488 U.S. 361, 371-72 (1988); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FPA v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *Yakus v United States*, 321 U.S. 414 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943).

Second, the Court of Appeals correctly concluded in this case that the nondelegation doctrine does not require as precise a delegation when the agency action is of more limited scope than a broad legislative rule of nationwide application. In this case, in exercising its authority under section 110(a)(2)(D), EPA did not issue a quasi-legislative rule, but

rather made quintessentially administrative, fact-specific determinations regarding dozens of state-to-state comparisons:

> [A]s a practical matter EPA must make a number of threshold determinations that in practice appear to have confined the statute to a modest role. Before assessing "significance," EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment.

213 F.3d at 680. *See also* H.R. 95-294, 330 95th Cong. 1st Sess., reprinted in 4 *A Legislative History of the Clean Air Act Amendments of 1977*, 2797 (1978) (describing the interstate transport provisions of the Act as "a Federal mechanism for resolving disputes which cannot be decided through cooperation and consultation between the States or persons involved"). Congress' delegation of authority to make this type of fact-specific, case-by-case determination does not implicate the non-delegation doctrine, which bars only the delegation of *legislative* power. *See Touby*, 500 U.S. at 165 (the nondelegation doctrine means "that Congress may not constitutionally delegate its legislative power to another branch of government.").

Recognizing the limitations of the legislative process, this Court's precedent establishes that administrative agencies must have ample leeway to apply Congress' policy choices on a case-by-case basis, as EPA did in this case. In *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), this Court recognized that Congress cannot oversee the application of its policy choices to all the specific factual circumstances that may arise:

> The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

329 U.S. at 105. *See also SEC v. Chenery*, 332 U.S. 194, 202-03 (1947) ("the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399-400 (1940) (referring to the need for the agency to use its expertise in applying the policy expressed in a statute to particular factual circumstances).

Indeed, the D.C. Circuit understood in *ATA* that EPA's exercise of its authority to review efforts to implement NAAQS, as in this case, did not implicate the same non-delegation concerns as the establishment of the NAAQS. In *ATA*, the Court of Appeals distinguished the decision of the First Circuit in *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), which, like the court below, upheld EPA's authority to determine the steps necessary to achieve a NAAQS against a nondelegation challenge:

> [T]he action challenged in *South Terminal* was EPA's adoption of a plan for ending or preventing

> violations in Boston of already-established NAAQS, not its promulgation of the NAAQS themselves. Thus, it seems likely that the "means" were the plan's provisions . . . and the "fairly precise[ly] defin[ed]" goals were the NAAQS themselves.

ATA, 175 F.3d at 1057. As in *South Terminal Corp.*, the action challenged here is EPA's adoption of a plan intended to end violations of the NAAQS. Thus, both courts of appeals to consider the issue have concluded that section 110 does not present a nondelegation problem.[11]

Finally, notwithstanding petitioners' claim that EPA's action is "unfettered by any obligation to obey Congress' proscription against arbitrary and capricious action" (*Industry Pet.* at 20), a reviewing Court is free to evaluate EPA's significant contribution determinations under an arbitrary and capricious standard, after giving due deference to its interpretation of the statute and its technical determinations. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) (deferring to agency's interpretation of statute that it was charged with administering). The D.C. Circuit did just that when it rejected EPA's inclusion of Wisconsin and the "coarse grid" portions of Georgia and Missouri in the rulemaking. Accordingly, there is no basis to the petitioners' non-delegation challenges.

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11. Furthermore, the decision in *ATA* upon which petitioners rely was incorrect for the reasons set forth in the briefs filed by the EPA, the northeastern States and other petitioners in *Browner v. American Trucking Ass'ns*, U.S. Supreme Court Nos. 99-1257, 99-1263 and 99-1265 (argued on November 7, 2000). Respondent Massachusetts seeks reversal of the D.C. Circuit's decision in *ATA* as a party in those cases and respondents New York, Connecticut, Maine, Maryland, New Hampshire, Rhode Island, and Vermont have all joined in an amicus curiae brief in those cases, supporting reversal of *ATA*.

CONCLUSION

For all the foregoing reasons, the Court should deny the petitions for certiorari.

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